Viewpoint

'One free strike' promotes fairness in state courts

By George W. Soule

Minnesota's "one free strike" rule helps lawyers achieve fair, just and efficient results for their clients. Absent evidence of systematic abuse or disruption, lawyers should retain the privilege of a peremptory judicial strike. (*See "Proposal would abolish peremptory removals" in the Oct. 3, 1999, issue of* Minnesota Lawyer.)

For over a century, "one free strike" has been part of the state's legal culture. Beginning in 1895, litigants could file an "affidavit of prejudice," which resulted in the automatic removal of an assigned judge. In 1949, the Minnesota Supreme Court recognized that the strike played an important role in "safeguarding, both in fact and appearance, the constitutional right to a fair and impartial trial." *Wiedemann v. Wiedemann*, 36 N.W.2d 810, 812-13 (Minn. 1949). "[C]onfidence in the impartial administration of justice is essential to the preservation of any democratic government. When the impartiality of a judge is questioned, he need assert no defense of his judicial integrity other than a ready willingness to leave the trial of the cause to another jurist." *Id.* at 812.

Minnesota's judiciary is one of the nation's finest. The state's judicial selection system, combined with nonpartisan judicial elections and strong cooperation between bench and bar, have produced a solid, hard-working judiciary.

But we all have our strengths and our weaknesses. A few judges may not be suitable for an assignment. Some may not have sufficient experience for a particular case or subject matter. Some may not be able to give a particular party or lawyer a fair hearing.

Some situations require a lawyer to strike a judge to ensure fair and just treatment for the client. The judge may do just fine in the next case or on the next calendar.

Thus, the "one free strike" rule promotes fairness. Equally important, it enhances the perception of fairness. The rule promotes public confidence and trust in Minnesota's justice system.

Anecdotal evidence and data indicate that the strike is sparingly used. Statewide statistics on removals are not collected. In Hennepin County, 395 removals were filed in 6,586 new civil cases (6 percent) in 1999. The 7th Judicial District (from St. Cloud to Moorhead) recorded 103 removals in 2,633 civil and felony cases (4 percent) filed last year. Finally, the 9th Judicial District (from Brainerd to Hallock) saw 123 removals in 7,100 new civil and criminal cases (1.7 percent).

This data is not surprising, because lawyers have incentives not to strike judges. In large counties with many judges, lawyers must weigh whether "you could do worse" with a replacement judge. In small counties, lawyers may risk alienating judges whom the lawyers cannot avoid forever. As a result, removals are not routine; rather, lawyers see the option as a "safeguard" or "safety valve."

In counties with many judges, removals can be no more than an administrative task. In smaller, rural counties, removals may require more accommodation. But there are many "acceptable" causes for disruption of judicial calendars — e.g., vacations, leaves, court business, conflicts of interest and recusals. In the days of facsimile, electronic mail, hearings by telephone and videoconferences, an occasional removal cannot bring the system to a halt. The disruptions are a small price to pay for the benefits of removals.

If automatic removals were abolished, litigants assigned to a judge who they perceive as biased would face an unhappy choice. A party could attempt to remove the judge with affidavits and public testimony besmirching the judge. If denied, the litigant may not have much hope that the judge will "remain" unbiased. The other choice is to swallow hard and hope that perceptions of unfairness do not bear true. "One free strike" minimizes these messy choices, confrontations and records.

Minnesota is not alone in granting litigants a peremptory judicial strike. Alaska, Arizona, California, Illinois, Indiana, Iowa, Montana, New Mexico, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming all have similar removal provisions.

If there are abuses in use of the privilege, other remedies should be considered. In *State v. Erickson*, 589 N.W.2d 481, 485 (Minn. 1999), the Supreme Court applied its "inherent authority to ensure the proper administration of justice" to prohibit "blanket filings" by prosecutors against a judge assigned to criminal cases. Removals for unlawful purposes may be regulated by the Rules of Professional Responsibility. Use of the block system of case assignment also may mitigate the disruptions of removals.

Our clients are the customers of the judicial system. Their interests in fair treatment should not be sacrificed by banishing our "one free strike."

GEORGE W. SOULE

Minneapolis attorney George W. Soule is a partner at the law firm of Bowman and Brooke LLP and chairs the Commission on Judicial Selection.